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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PENNZOIL COMPANY,

Appellant,

v.

TEXACO, INC.,

Appellee.

On Appeal from the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF THE POSITION OF APPELLEE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF THE POSITION OF APPELLEE

This brief *amici curiae* in support of the position of the appellee is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of national and international labor organizations having a total membership of approximately 13,000,000 working men and women, and by the Oil, Chemical and Atomic Workers International Union, AFL-CIO, an international union many of whose members work in the oil and gas industry, with the consent of the parties as provided for in this Court's rules.

SUMMARY OF ARGUMENT

I. In Point I of the Argument we show that application of Texas' lien and bond provisions would, in the circumstances of this case, deprive Texaco of due process of law in violation of the Fourteenth Amendment.

Where a state has created a right of appeal, the state must "offer each defendant a fair opportunity to obtain adjudication of the merits of his appeal". (*Evitts* v. *Lucey*, 469 U.S. 387, 405. See also *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429-430.)

The purpose of lien and bond provisions such as those of Texas herein is to protect the judgment creditor against the dissipation of the judgment creditor's assets pending appeal. But that policy does not come into play where (as the Chairman of Pennzoil's Board acknowledged is true here) the judgment is secure without imposing potentially ruinous requirements on the prospective appellant. The mandatory posting of full security in such a situation cuts deeply into the defendant's due process rights, all the more so where a claim of error on the state appeal will be that the judgment is excessive. A legal rule that conditions the right of appeal (or the suspension of the judgment pending appeal) on the posting of a bond in the amount of the judgment has the perverse consequence of insulating an error from review because of its very magnitude.

Pennzoil would have the Court decide the due process issue presented here under the "minimum rationality" standard applicable to economic regulation. It is highly doubtful whether the application of Texas' lien and bond provisions in this case would satisfy even that standard. In any event, Pennzoil is wrong on principle. This constitutional issue concerns the respective rights of judgment creditors and judgment debtors as *litigants* rather than as "economic actors". (Brief for Appellant Pennzoil Company ("Pennz. Br.") 49) Thus, easy cases like the

present, and closer ones that may arise in the future, should be decided according to the standard of review pertaining to *procedural* due process where this Court has consistently conducted a more rigorous inquiry. (*E.g.*, *Fuentes* v. *Shevin*, 407 U.S. 67, 80-93; *Mathews* v. *Eldridge*, 424 U.S. 319, 332-349.)

Pennzoil asserts that the constitutional ruling of the Court of Appeals is contrary to precedent in this Court. But neither of the two cases that Pennzoil cites for that proposition passed on the constitutionality of a law which required a bond as a condition for a stay of execution pending appeal. In the first of these, *National Union* v. *Arnold*, 348 U.S. 37, the Court held only that a state court may constitutionally dismiss an appeal for failure to comply with a court order, entered in aid of execution, requiring the defendant-appellant to deposit certain assets in the court pending appeal. In *Louis. & Nash. R.R.* v. *Stewart*, 241 U.S. 261, the issue was whether a state may, if the appeal is unsuccessful, add ten percent to the judgment as the cost of obtaining a supersedeas. Pennzoil's citation of the *Stewart* case is doubly erroneous because the Court's opinion does not purport to decide any due process issue, and, indeed, the petitioner in this Court argued only that the Federal Employer's Liability Act did not authorize the state courts to make such an award. (See Br. for Petitioner No. 485, Oct. Term 1915, p. 10.)

II. Our discussion in the Argument thus establishes that Texaco has shown deprivation of a right "secured by the constitution and laws of the United States". The second element of a 42 U.S.C. § 1983 claim—that the defendants have acted "under color of state law," in other words, that "state action" must be shown—is also satisfied here. The usually more troublesome issues in determining whether there is state action are not in controversy in this case because, under Texas law, the state is directly involved in making an attachment if the judg-

ment debtor does not post a supersedeas bond in the full amount of the judgment. Pennzoil, however, disputes the proposition that this system of executing judgments constitutes joint action by the judgment creditor and the state. The court below correctly rejected that contention on the authority of *Lugar* v. *Edmondson Oil Company*, 457 U.S. 922. The joint action provided for by Texas law is indistinguishable from that found in *Lugar*; the circumstance that a *post*judgment rather than a *pre*judgment attachment is at issue here does not change the nature of this joint action.

There is no merit to Pennzoil's contention that the courts below should have abstained under *Younger* v. *Harris*, 401 U.S. 37. The Court of Appeal's conclusion that this case does not implicate "important", "substantial" or "vital" state interests and that abstention would therefore be inappropriate is fully in accord with *Younger* and its progeny and the decisions of other courts of appeals. See, *e.g.*, *Traughber* v. *Beauchane*, 760 F.2d 673, 680-81 (6th Cir., 1985); *Miofsky* v. *Superior Court of State of Cal.*, 703 F.2d 332, 336-38 (9th Cir. 1983); *Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir., 1979), *cert. denied*, 444 U.S. 1074. Moreover, the court below correctly concluded that abstention under *Younger* naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. *Gibson* v. *Berryhill*, 411 U.S. 564, 577. In contending, contrary to the Court of Appeals, that Texas law would have provided Texaco with such an opportunity, Pennzoil does not even discuss the Texas decisions to the opposite effect which were carefully analyzed by the Court of Appeals.

ARGUMENT

I. WHERE A STATE GRANTS THE RIGHT OF APPEAL FROM A CIVIL MONEY JUDGMENT, STATE LIEN AND BOND PROVISIONS WHICH BURDEN THAT RIGHT ARE SUBJECT TO FOURTEENTH AMENDMENT CONSTRAINTS.

A. Under Texas law a defendant in a lawsuit who has suffered a money judgment and who desires to appeal may suspend the execution of the judgment only by filing a bond in "at least the amount of the judgment, interest, and costs" or by depositing such amount with the court. (Tex. R. Civ. P. 364b. See 784 F.2d at 1138 and n.4.)[1] In upholding the grant of a preliminary injunction against the enforcement of that requirement in this case the Court of Appeals held "that Texaco's claim that the Texas bond and lien provisions den[ied] due process presents a fair ground for litigation." (784 F.2d at 1153-1154.)

The Court of Appeals observed that its "decision rests partly upon the extraordinary circumstances of this case, which are unlikely ever again to recur." (784 F.2d at 1157.) After describing those circumstances, the Court continued: "For these reasons our decision, like that of the Fifth Circuit in *Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), is obviously a narrow one in its scope and application." (784 F.2d at 1157.) While we agree that there will be few occasions on which it will be necessary for a federal court to issue an injunction in order to protect a state court defendant's right to appeal in the face of state law security requirements which

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[1] See also Tex. Prop. Code Ann. §§ 52.001 *et seq.* (Vernon 1983) which "provides that an abstract of judgment presented by the judgment creditor, when properly recorded and indexed, constitutes a lien 'on the property of the defendant located in the county in which the abstract was recorded and indexed . . .'" (784 F.2d at 1138, quoting § 52.001.)

would make the appeal impossible or create severe hardship for the defendant, the principle enunciated by the court below is nevertheless an important one.

As the *Henry* case cited by the Court of Appeals illustrates, organizations or other parties which are unpopular in a particular jurisdiction, or whose behavior a particular court or jury finds to be especially offensive may be faced with a judgment of such enormity (compared to their assets) that they are unable to satisfy the state's lien and bond requirements or are able to do so only by taking steps that cause them irreparable harm during the pendency of the appeal.

Moreover, in many such cases, permitting execution will be so harmful to the defendant that the plaintiff will be able to use the threat to execute to coerce a settlement from the defendant on terms that do not fairly reflect the strength of each party's position with respect to the merits of the appeal. The present case appears to be an instance of the use of such state security laws as a bargaining weapon. (See 784 F.2d at 1155.)

It is also true that there have been cases in which a prospective appellant is required to post a bond in the amount of the judgment (or greater) in order to stay execution pending appeal even though the judgment debtor cannot as a practical matter comply with the bond requirement and the size of the judgment is itself a ground for appeal. Based on our understanding of Texaco's arguments on appeal from the state court judgment at issue here, this is such a case.

In each of the foregoing ways, state lien and bond requirements may be applied so as to undermine the essential fairness of the state's procedures for adjudicating civil claims and, indeed, so as to threaten the even-handed application of the rule of law.

B. The Court of Appeals recognized that "due process requires that, once the state has created a right of appeal,

it must 'offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal.'" (784 F.2d at 1154, quoting *Evitts* v. *Lucey*, 469 U.S. 387, 405.) *Evitts* was a criminal case, but its principle applies equally to civil cases like the instant one. In *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429-430, a civil case, the Court held that "the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].' *Boddie* v. *Connecticut*, 401 U.S. 371, 380 (1971)." [2]

Pennzoil's own discussion of the purpose of the Texas law at issue here shows that the application of the state's rules in the circumstance of this case would be unconstitutional. In Pennzoil's words: "Some 30 . . . states, including Texas, have decided that, once a trial is complete, the judgment creditor is presumptively entitled to a supersedeas bond equal to or greater than the judgment, as assurance that the creditor will be able to collect the award (and interest) if it is ultimately affirmed." (Brief for Appellant Pennzoil Company ("Pennz. Br.") 47.)[3] The conclusion that such a law

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[2] See also Justice Harlan's dissenting opinion in *Griffin* v. *Illinois*, 351 U.S. 12 at 37: "Of course the fact that appeals are not constitutionally required does not mean that a State is free of constitutional restraints in establishing the terms upon which appeals will be allowed." Justice Harlan subsequently stated, that "[so] far as the result in that case rested on due process grounds, I fully accept the authority of *Griffin*." (*Douglas* v. *California*, 372 U.S. 353 at 361, n.1 (dissenting opinion).)

[3] The word "presumptively", used in the same context at Pennz. Br. 46, is apparently designed to convey the impression that Texas will grant the judgment debtor relief from "the general rule" (*id.*); *viz.*, that state law permits the presumption to be rebutted. The court below concluded that Texas law is to the contrary. (784 F.2d at 1148-1149.)

may not, consistent with due process, be applied where the court determines that the judgment creditor will be able to collect on his judgment (and interest) without the judgment debtor being required to post such security does not, as Pennzoil argues, "countermand [that] state policy choice" (Pennz. Br. 48). In terms of the present record, requiring Texaco to post a bond in the amount of the state court judgment or suffer attachment of its property pending appeal is not necessary to accomplish Texas policy of protecting Pennzoil's interest in ultimately obtaining the fruits of its judgment in the event of affirmance and, in the circumstances here, that requirement as a practical matter is ruinous to Texaco.

The mandatory posting of full security in such a situation cuts deeply into the defendant's due process rights particularly where the claim of error on appeal is that the jury has been erroneously instructed on the measure of damages, or on the availability or amount of punitive damages that may be awarded, or that the jury was improperly swayed by sympathy for the plaintiff and repugnance to the defendant and the trial court failed to set aside the excessive verdict.[4] For a legal rule that conditions appeal (or the suspension of the judgment pending appeal) on the posting of a bond in the amount of the judgment has the perverse consequence of preventing review of the error because of its very magnitude: The greater the judgment, compared to the assets of the defendant, the more likely it would be that the error is insulated from appellate scrutiny.

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[4] The problem described in the text is of special concern to labor organizations. In *Linn* v. *Plant Guard Workers*, 383 U.S. 53, this Court held that states may entertain defamation suits arising out of a labor dispute but admonished that "[i]f the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial. (*Id.* at 65-66). The Court has twice since deemed it necessary to reiterate that admonition. *Letter Carriers v. Austin*, 418 U.S. 264, 287, n.17 (defamation); *Farmer v. Carpenters*, 430 U.S. 290, 306 (intentional infliction of mental suffering).

In a case like this one, then, Texas' security requirement denies due process because the state law both fails to "offer [the] defendant a fair opportunity to obtain an adjudication on the merits of his appeal" (*Evitts* v. *Lucey*, 469 U.S. at 405) and does so without advancing any substantial state interest, indeed, without any discernible reason.

C. The egregious situation presented here far from exhausts the situations in which state lien and bond laws seriously burden the right to appeal. Where such laws operate in a less rigorous and arbitrary manner, a judgment debtor's constitutional attack will, of course, have far less force than Texaco's. It is not necessary and, we submit, not wise or prudent, to prejudge such cases by taking the initial occasion on which this Court is called upon to consider the complex set of questions presented here to settle all facets of the problem. It is appropriate, nonetheless, we believe, to respond to two arguments advanced by Pennzoil which, if given credence, would seriously prejudice the further development of the law in this area.

1. Pennzoil would restrict constitutional review of Texas' lien and bond laws to the "test of minimum rationality" by treating the constitutional issue here as if "economic regulation," whereby the state "has subordinated the rights of some economic actors" to the conflicting rights of others, were involved. (Pennz. Br. 49.) But while economics in the sense of money is unquestionably at the core of the controversy between Pennzoil and Texaco, the constitutional issue does not concern their respective rights as "economic actors" but as *litigants*. The standard by which Texas' and like, laws, is to be reviewed is, therefore, not that which has prevailed "since the demise of the concept of 'substantive due process' *in the area of economic regulation*," (*id.*, quoting *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox*

Co., 439 U.S. 96, 106-107, our emphasis), but that pertaining to *procedural due process*, where this Court has consistently conducted a more rigorous inquiry. (See, *e.g.*, *Fuentes* v. *Shevin*, 407 U.S. 67, 80-93; *Mathews* v. *Eldridge*, 424 U.S. 319, 332-349; *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 12-22.)

2. According to Pennzoil, "[u]ntil the ruling below, it was well established that a civil litigant, however sympathetic in its case, has no due process right to be free from the execution of a judgment pending its appeal," saying that "this Court has expressly so held." (Pennz. Br. 48.) Neither of the two cases cited for that proposition so much as considered the questions presented here.

In *National Union* v. *Arnold*, 348 U.S. 37, the state trial court had ordered the petitioner to deliver certain bonds to a receiver for deposit in court in order to secure the trial court's judgment pending appeal. When the petitioner failed to do so the court adjudicated that party in contempt and when the petitioner failed to purge itself of the contempt by delivering the bonds, dismissed the appeal. The petitioner did not in this Court challenge the validity of the trial court's order to deliver the bonds, let alone contend that it was impossible, or even difficult, to produce security for the judgment pending appeal; indeed, the supplemental proceedings which gave rise to the order established that the petitioner could do so by depositing the bonds. Rather, the petitioner's contention was that, *without regard to the practicalities, dismissal of its appeal for failure to comply with that execution order* violated its rights under the Fourteenth Amendment. In rejecting that due process argument the Court analogized the dismissal of an appeal because of a refusal to comply with an order to produce to the often approved dismissal of a criminal appeal because the appellant has become a fugitive from justice:

> While this Court has not, until now, passed upon the constitutionality of a state court's dismissal of an appeal in a case like the present, it has decided somewhat comparable issues. Where the subject matter of litigation has been removed or has removed itself from the jurisdiction of a state court in violation of that court's orders, this Court has upheld a dismissal of the offending litigant's appeal. [348 U.S. at 43.]

The constitutional issue presented by this case was likewise not presented or decided in *Louis. & Nash. R.R.* v. *Stewart*, 241 U.S. 261. The sentence from which Pennzoil plucks one clause (Pennz. Br. 48) reads in full:

> There was no obligation upon the State to provide for a suspension of the judgment and *nothing to prevent its making it costly in cases where ultimately the judgment is upheld.* [241 U.S. at 263, emphasis added]

The railroad, which was the judgment loser in the state trial court, did not contend that the state law supersedeas bond provisions had prevented an appeal from that judgment or so burdened the railroad as to render its appeal a meaningless ritual. Rather, the railroad's argument in this Court was that the state appellate court erred in adding ten percent damages to the amount of the judgment when the appeal was unsuccessful for the cost of obtaining a supersedeas. Even that issue, remote as it is from this case, was *not* raised—and therefore not decided—under either the Due Process or Equal Protection Clause of the Fourteenth Amendment. Rather, the railroad *argued only that the Federal Employers Liability Act* (FELA) (under which the claim at issue had been brought) *did not authorize the state courts to make such an award.*[5] In short, the fragment

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[5] The railroad stated its position in *Louis. & Nash. R.R.* as follows:

> 1. Defendant's first assignment of error, that "the said Court of Appeals of Kentucky erred in entering judgment

of a sentence on which Pennzoil relies is mere *dictum*, and at that not even on a point of constitutional law. To be sure, Justice Holmes' terse style "did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert". (*Paraiso* v. *U.S.*, 207 U.S. 368, 372, Holmes, J.). But is it now to be supposed that the Court reached out to interpret the Fourteenth Amendment in disposing of an argument which invoked only the FELA?

II. PENNZOIL'S JURISDICTIONAL CONTENTIONS ARE WITHOUT MERIT.

Pennzoil contests federal jurisdiction over Texaco's claims on two grounds: (a) that the Anti-Injunction Act, 28 U.S.C. § 2283, bars the federal courts from exercising their equity powers in this type of case; and (b) that *Younger* v. *Harris*, 401 U.S. 37, and its progeny require abstention in the present circumstances. The Court of Appeals correctly rejected both contentions.

A. This Is A Proper 42 U.S.C. § 1983 Suit.

1. The Court of Appeals held that Texaco's challenge to the Texas lien and supersedeas bond provisions as applied here states the essential elements of an action under 42 U.S.C. § 1983, and that injunctive relief on those claims is therefore not subject to the restrictions of the Anti-Injunction Act. "In order to maintain a § 1983 claim", said that court,

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affirming the judgment of the Warren Circuit Court of Kentucky for the sum of eleven thousand eight hundred and eighty-five dollars ($11,885.00), together with costs, interest, and 10% damages, entered in error in favor of said Defendant in Error and against said Plaintiff in Error," challenges the right of the Court of Appeals of Kentucky to affirm the judgment in this case with damages and interest, in that there is no provision in the Federal Employers' Liability Act authorizing the allowance of interest and damages in addition to compensation for loss of pecuniary benefits. [Br. for Petitioner, No. 485, Oct. Term, 1915, p. 10; bold face omitted]

> a litigant must allege and show deprivation (1) of a right "secured by the Constitution and laws of the United States", (2) by a defendant acting under color of state law. [784 F.2d 1145, citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155.]

The first of these elements, the deprivation of a constitutional right, has been discussed in Point I, *supra;* since Pennzoil contests the presence of the second of these elements as well, we turn now to the "color of state law" issue.

The Court of Appeals found that, in the circumstances here, Pennzoil is a state actor (and is therefore acting under "color of state law") primarily on the authority of *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922.[6] *Lugar* sets forth a two-part approach for determining whether conduct which results in deprivation of a federal right is "fairly attributable to the state":

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. [457 U.S. at 937, quoted at 784 F.2d at 1145.]

In the present case, the Court of Appeals determined that

> Texaco has satisfied the first prong of this test since Texas state law provides for enforcement of the judgment unless Texaco posts a supersedeas bond in

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[6] *Lugar* held that "[i]f the challenged conduct of [a party] constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983." (457 U.S. at 935.)

> the full amount of the judgment. Tex.R.Civ.P. 364(b), *supra*. [784 F.2d at 1145.][7]

With regard to the second prong of the *Lugar* test we recognize at the outset that the conclusion that an otherwise private party is a state actor to whom the Constitution applies is strong social medicine. Accordingly, as the *Lugar* Court emphasized,

> [c]areful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order. [457 U.S. at 936-937.]

The most attenuated state action claims are those based on the theory that an otherwise private party, *acting on its own and without the involvement of state officials*, is the recipient of sufficient state approval or support to be deemed a state actor. See *e.g.*, *Rendell-Baker* v. *Kohn*, *supra*, and *Blum* v. *Yaretsky*, *supra*. This is not such a case, as the Court of Appeals recognized:

> To enforce the judgment, Pennzoil would have to act jointly with state agents by calling on state officials to attach and seize Texaco's assets. A judgment creditor must first obtain a writ of execution, which is "a process of the court from which it is issued." Tex.R.Civ.P. 622. The writ is "'directed to

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[7] In two cases decided on the same day as *Lugar*, the Court held that the challenged conduct of the private party was not "state action" because the federal plaintiffs had not established the "first prong", *viz.*, had failed to show state involvement in the allegedly unconstitutional conduct. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-840; *Blum v. Yaretsky*, 457 U.S. 991, 1002-1012. See also *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-351.

> any sheriff or any constable within the State of Texas" and must be signed by the clerk or justice and bear the seal of the court. Tex.R.Civ.P. 629. Furthermore, the writ "shall require the officer to execute according to its terms." *Id.* Finally, when, as here, the judgment requires payment of money, the writ "must require the officer to satisfy the judgment and costs out of the property of the judgment debtor subject to execution by law." Tex.R.Civ.P. 630. When the sheriff or constable receives the writ, Texas law commands that "he shall proceed without delay to levy the same upon the property of the defendant". Tex.R.Civ.P. 637. Property levied upon pursuant to the writ of execution may ultimately be seized by the officer and liquidated to satisfy the judgment. Tex.R.Civ.P. 646a, 649.
>
> In addition, Texas law authorizes the placement of judgment liens upon Texaco's property in the state immediately upon entry of judgment. Tex. Prop.Code Ann. § 52.001. Such liens are acquired by requesting state officials to undertake a series of acts. Pennzoil must obtain a certified abstract of the judgment from the clerk of the court which rendered judgment. *Id.* § 52.002. The abstract must contain certain information required by law. *Id.* § 52.003. The county clerk must then record the abstract in the county judgment record and enter it in the index to the record. *Id.* § 52.004.
>
> Enforcement of the state court judgment therefore necessarily involves a panoply of activities undertaken together by Pennzoil and state officials, which constitutes joint action for the purposes of § 1983. [784 F.2d at 1145-1146.]

In short, the requisite *joint action* between Pennzoil and state officials was deemed by the court below to be indistinguishable from that in *Lugar* which, like this case, involved the question of whether an attachment pursuant to state law—there, the law of Virginia—is properly deemed state action. (See 784 F.2d at 1146.)

The Court of Appeals concluded further that the circumstances that *Lugar* involved a *pre*judgment attachment whereas this case involves a *post*judgment attachment is an immaterial difference:

> The presence of a court judgment does not alter the fact that Texas state officials execute the judgment only at Pennzoil's behest. Pennzoil cannot be divorced from that execution procedure merely because a court authorized execution of the judgment. Indeed, to so hold would preclude the victim from obtaining relief against the party who must act jointly with the state official to unleash the unconstitutional state government action. [784 F.2d at 1146.]

In this Court, Pennzoil takes issue with the court below principally on the ground that *Lugar* is inapplicable because the *Lugar* opinion stated that the Court's holding there "was limited to the particular context of prejudgment attachment." (Pennz. Br. 12, quoting 475 U.S. at 939, n.21.)[8]

The assertion that *Lugar* left open the question whether a private party may, in certain situations, be deemed a state actor by its use of postjudgment attach-

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[8] Pennz. Br. 13 asserts that this limitation in the *Lugar* Court's holding was "twice expressly stated", citing also 457 U.S. at 942. In this respect, Pennzoil clearly errs, for at that point there is no reference to the prejudgment aspect of that case; rather, the Court referred to "state-created attachment procedures" generally:

> The Court of Appeals erred in holding that in this context "joint participation" required something more than invoking the aid of state officials to take advantage of *state-created attachment procedures*. That holding is contrary to the conclusions we have reached as to the *applicability of due process standards to such procedures*. Whatever may be true in other contexts, this is sufficient when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute. [457 U.S. at 942, emphasis added.]

ment procedures states the problem, not the answer. And that concededly open question is, of course, to be decided according to the principles declared in *Lugar* and this Court's other state action decisions.

It is clear from these decisions that the critical consideration in a case like this is "joint participation" between the private party and state officials in the deprivation of the asserted constitutional right. *Lugar*, 457 U.S. at 941-942. See also *Rendell-Baker* v. *Kohn*, 457 U.S. at 838-839, n.6: "*Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978), and *Lugar* [457 U.S.] p. 922, illustrate the relevance of whether action was taken in concert with a state actor."

There is no doubt that the circumstance that an attachment occurs after a judgment is obtained rather than before affects the determination of whether the procedures that were followed violate the Constitution. (See Point I, *supra.*) But as a matter of simple logic, it is beyond dispute that a postjudgment attachment accomplished with the same type and quantum of joint participation with state officials as a prejudgment attachment is as much state action as the prejudgment attachment. Such a postjudgment attachment may be constitutional even if the prejudgment attachment is not; but under the *Lugar* analysis, both are state action. The Court of Appeals was therefore correct in refusing to find the *timing* of an attachment a basis for distinguishing between the state action in *Lugar* and that here.[9]

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[9] Pennzoil asserts that "surely the 4½ month trial that preceded the entry of Pennzoil's judgment involved 'the independent judgment of the state judiciary,' and this is where the contrast with *Lugar*—and the Second Circuit's error—could not be more plain." (Pennz. Br. 14.) Pennzoil's certitude is wholly unjustified. The "independent judgment of the state judiciary" was obtained on the *merits* of Pennzoil's suit against Texaco, but—under the Texas procedure—no such independent judgment operates as a restraint on the attachment, whose constitutionality is the issue herein. This distinction between adjudication of the claim and of the attachment

2. In *Mitchum* v. *Foster*, 407 U.S. 225, 226, the Court began by stating:

> The federal anti-injunction statute provides that a federal court "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." An Act of Congress, 42 U.S.C. § 1983, expressly authorizes a "suit in equity" to redress "the deprivation," under color of state law, "of any rights, privileges, or immunities secured by the Constitution. . . ." The question before us is whether this "Act of Congress" comes within the "expressly authorized" exception of the anti-injunction statute so as to permit a federal court in a § 1983 suit to grant an injunction to stay a proceeding pending in a state court. [Footnotes omitted.]

And the *Mitchum* Court held without dissent: "[U]nder the criteria established in our previous decisions construing the anti-injunction statute, § 1983 is an Act of Congress that falls within the "expressly authorized" exception of that law." (407 U.S. at 242-243.)

Pennzoil nonetheless attempts to use the *Mitchum* holding as a ground for restricting the coverage of § 1983 by arguing that § 1983 must be construed—and limited—by considering its effects on the Anti-Injunction Act. (Pennz. Br. 15-17.) It is Pennzoil's argument in this

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procedure fundamentally differentiates this case from *Dennis v. Sparks*, 449 U.S. 24, 28, cited at Pennz. Br. 15, as the Court of Appeals recognized:

> Finally, we note that Texaco's challenge to the state bond and lien provisions does not call into question the validity of the underlying judgment. Thus, this is not a case where a private party is alleged to be a state actor merely because it brought suit and sought a judicial ruling. *See Dennis v. Sparks*, 449 U.S. 24, 28. [784 F.2d at 1146-1147.]

Thus, Pennzoil's argument in this respect is not only beside the point for the reason given in the text, but wrong in its own terms as well.

regard that would "turn[] the law on its head". (*Cf.*, *id.* at 8.)

There is no justification whatsoever for narrowing § 1983 in light of the Anti-Injunction Act. Rather, § 1983 is to be construed in the light of its "very purpose"; *viz.*, "to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" (*Mitchum*, 407 U.S. at 242, quoting *Ex parte Virginia*, 100 U.S. 339, 346.) For the "expressly authorized by Act of Congress" exception written into the Anti-Injunction Act embodies the Legislature's determination that "the policies animating" that Act (Pennz. Br. 16) are *not* absolute; those policies do *not* override other Acts of Congress which "clearly creat[e] a federal right or remedy enforceable in a federal court of equity [that] could be given its intended scope only by the stay of a state court proceeding" (*Mitchum*, 407 U.S. at 238).[10]

It follows that the Court of Appeals was entirely correct in refusing to be led astray by an inquiry into the effects of its interpretation on the operations of the Anti-Injunction Act; an inquiry which Congress rendered wholly inappropriate by the "expressly authorized" exception to that Act.

Pennzoil's frenzied efforts to find a way to reduce the scope of § 1983 fails also because Pennzoil grossly exaggerates the effect of the decision below on the federal courts' power to enjoin state court proceedings. Pennzoil says that if the decision below is affirmed, the "result will

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[10] Pennzoil's assertion in its summary of argument that the Anti-Injunction Act is the "statute through which Congress, ever since 1793, has voiced a *steadfast insistence* that the federal courts not interfere with state court proceedings (Pennz. Br. 8, emphasis added) thus betrays a steadfast insistence on Pennzoil's part to ignore that Act's literal language and this Court's *Mitchum* holding.

be to render § 2283 inoperative with respect to federal court interference with state post-trial and appellate processes". (Pennz. Br. 16.) Simply stated, Pennzoil's entire discussion proceeds as if it were sufficient to establish a violation of § 1983 that "a private litigant", or "state court judgment winner" is the defendant in the § 1983 case. That, of course, is not the rule. The court below in the first place did not decide that every such party is a "state actor". The argument at Pennz. Br. 15-17, moreover, entirely ignores the proposition that a § 1983 case can be made out *only by establishing the violation of a federal constitutional right.* This is the major hurdle which will inhibit "state court judgment losers [from] mount[ing] collateral federal attacks on state court procedures regulating the enforcement of state judgments and other aspects of the state appeal process." (Pennz. Br. 17.) Every action of the government is, of course, state action but that does not mean that all such actions are the stuff for making § 1983 complaints. Prospective plaintiffs know that it is the substance of the relevant constitutional law that is the ultimate determinant of whether state action creates a colorable § 1983 claim.

In sum, Pennzoil's argument is irreconcilable with *Mitchum* and unfaithful to both the "very purpose" of § 1983 and to Congress' decision to circumscribe the Anti-Injunction Act by enacting the "expressly authorized" exception to that Act.

B. The District Court Properly Declined to Abstain from Deciding This Case.

Pennzoil reiterates its contention, rejected by the Court of Appeals, that *Younger* v. *Harris*, *supra*, requires the District Court to abstain from deciding Texaco's claims at issue here. The court below ruled that Pennzoil had failed to satisfy two of the essential elements for *Younger* abstention: "(1) 'important', 'sub-

stantial' or 'vital' state interests must be at stake, and (2) state procedures must be available to provide an adequate opportunity for the appellant to raise his federal claims in a state court." (784 F.2d at 1149.)

In this Court, Pennzoil contends that Texaco has "pioneered" and the Second Circuit has "endorsed" "escape routes" from *Younger*. (Pennz. Br. 23, heading.) While this is a neat metaphor, the adventurism is all on Pennzoil's part; the decision below is in fact in complete accord with precedent.

1. In holding that the first of the conditions for *Younger* abstention just quoted was not met here, the Second Circuit said:

> Pennzoil's contention would also render meaningless and unnecessary the exercise, regularly engaged in by federal courts called upon to abstain, of analyzing the state interests and remedies involved to determine whether *Younger* abstention is mandated. *See, e.g., Traughber v. Beauchane*, 760 F.2d 673, 680-81 (6th Cir. 1985); *Miofsky v. Superior Court of State of Cal.*, 703 F.2d 332, 336-38 (9th Cir. 1983). [784 F.2d at 1149.]

In *Traughber*, Judge Krupansky had written:

> It is immediately obvious that the case at bar is vitally different from each of the cases in which the Supreme Court has permitted the extension of *Younger* to putatively "civil" state proceedings. In each such case the state was a party to the underlying state judicial proceeding. In addition, each of those cases was criminal or quasicriminal in nature or otherwise presented issues on matters essential to the operation of the state government. *See Miofsky v. Superior Court*, 703 F.2d 332, 337 (9th Cir. 1983). [760 F.2d at 680.]

The analysis of the court below in this case, of the Sixth Circuit in *Traughber* and of the Ninth Circuit in *Miofsky* rests on a thorough examination of this Court's decisions; we therefore add only one word to their reasoning.

It bears recalling that in this respect, as well as in its other jurisdictional aspects, the Court of Appeals' decision herein was anticipated by *Henry* v. *First National Bank of Clarksdale, supra.* In *Henry*, the Fifth Circuit affirmed an injunction staying enforcement of the damage judgment subsequently set aside by this Court on First Amendment grounds in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886. With respect to abstention under *Younger*, the Fifth Circuit ruled, anticipating the reasoning of the court below:

> While certain considerations of comity and federalism pertain to civil proceedings as well as to criminal prosecutions the Supreme Court thus far has declined to extend the *Younger* doctrine to all civil litigation. [595 F.2d at 300.]

Pennzoil, however, would brush *Henry* aside, saying: "With respect to staying enforcement of the award of damages, the injunction was not issued to preserve appellate jurisdiction over the state judgment, but in aid of a prior, never-appealed and never-dissolved injunction issued by the district court itself, which concerned bank accounts containing the funds of the state court defendant." (Pennz. Br. 38, n.35.) That assertion is manifestly incorrect. The District Court in *Henry* had entered *three* orders; only one of these (discussed in Part II of the Fifth Circuit's opinion (595 F.2d at 305-307)) was predicated, and affirmed, on the basis of the prior injunctions to which Pennzoil refers. (See also the quotation at Pennz. Br. 38-39, n.35 of 595 F.2d at 307.) In Part I of the *Henry* opinion, the Fifth Circuit discussed and affirmed "the broadest of the three [injunctive] orders [,which] largely encompassed the relief embodied in the other two." It is in this portion of its opinion that the *Henry* court rejected contentions (identical to those made by Pennzoil here) based on 28 U.S.C. § 2283 and *Younger*. In deciding those issues and affirming the "broadest" of the district court's injunctive orders the Fifth Circuit

did not rely on the prior "bank accounts" injunction that had been entered in that case.[11]

2. Abstention under *Younger* "naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson* v. *Berryhill*, 411 U.S. 564, 577. *See also Moore* v. *Sims*, 442 U.S. 415, 425, quoting *Juidice* v. *Vail*, 430 U.S. 327, 337. This opportunity must be real rather than theoretical; the potential for relief in the state court must not be a mere "teasing illusion like a munificient bequest in a pauper's will" (*Edwards* v. *California*, 314 U.S. 160, 186 (Jackson, J., concurring), quoted in part at Pennz. Br. 49).[12]

While their adequacy for *Younger* purposes is a matter of federal law, the question of what opportunities

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[11] This is so plain from the language and structure of the *Henry* opinion that emphasis should be unnecessary. But given Pennzoil's apparent misunderstanding, we note that if the affirmance of the first order had rested at all on the prior injunction, the Fifth Circuit's discussion of the "expressly authorized exception" and of *Mitchum, supra* (595 F.2d at 300), would have been superfluous; 28 U.S.C. § 2283 would have been inoperative by virtue of the "where necessary . . . to protect or effectuate its judgments" exception, *as the Fifth Circuit ruled in Part II of its opinion with respect to the District Court's second order* (595 F.2d at 306).

[12] Such an opportunity, we submit, requires that the state courts would entertain a challenge to the state law or its application to the appellant before that party suffers irreparable injury. Pennzoil argues at length that Texas law would have provided Texaco with such an opportunity. (Pennz. Br. 25-32.) The court below, as we have noted, held to the contrary. (784 F.2d at 1150-1152.) The question whether the Court of Appeals erred in its reading of Texas law was not separately raised in the Jurisdictional Statement, perhaps on the anticipation that, if Pennzoil prevails in the Texas court, it will resist a *certiorari* petition by Texaco for review by this Court of an adverse interpretation of the applicable law of New York. If, nevertheless, the issue is properly presented as encompassed in the questions which Pennzoil did raise, we leave it to the briefs of the parties. We do note, however, that Pennzoil fails to discuss any of the Texas cases relied on by the court below on this point.

the state courts actually afford the federal plaintiff is a matter of state law. That question of state law will often be hotly contested in the federal district court (as this case illustrates). An erroneous federal court decision one way or the other may well have undesirable consequences: If the federal court determines that state law does provide an adequate opportunity and events prove otherwise, federal rights may be forfeited; if the federal court takes too narrow a view of the opportunity provided by state law, the objectives of the *Younger* doctrine may be needlessly sacrificed. We submit that this is therefore an appropriate occasion to remind the lower courts that where the state law questions are close and there are other relevant factors militating toward abstention, this Court's decision in *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, provides a practical means for avoiding this dilemma. There, Justice Harlan wrote:

> Because of its findings, amply supported by the evidence, that the existence and threatened enforcement of these statutes worked great and immediate irrparable injury on appellees, the District Court's abstention with respect to Chapters 33 and 36 proceeded on the assumption "that the defendants will continue to cooperate, as they have in the past, in withholding action under the authority of the statutes until a final decision is reached . . ." 159 F. Supp. at 534. In this Court counsel for the appellants has given similar assurances with respect to the three statutes presently before us, assurances which we understand embrace also the intention of these appellants never to proceed against appellees under any of these enactments with respect to activities engaged in during the full pendency of this litigation. *While there is no reason to suppose that such assurances will not be honored by these or other Virginia officials not parties to this litigation, the District Court of course possesses ample authority in this action, or in such supplemental proceedings as may be initiated, to protect the appellees while this*

case goes forward. [360 U.S. at 178-179; emphasis supplied.] [13]

The lesson of *Harrison* for cases like the present (again assuming *arguendo* that *Younger* is applicable) is clear. If the district court determines that the federal plaintiff has or may have an opportunity to secure relief in state court from the onerous requirements of the state lien and bond provisions and should be required to invoke those potential remedies, that court should protect the the federal court plaintiff against irreparable injury during the state proceedings and, if state court relief is denied, until the federal court has the opportunity to adjudicate the federal claim. *Harrison* teaches that the district court may therefore retain jurisdiction over the § 1983 action and condition its direction that the state remedy be pursued on the federal court defendant's commitment (or on an order binding that party) not to execute on the federal plaintiff's property without further order of the federal court.

CONCLUSION

For the above-stated reasons, the judgment below should be affirmed.

Respectfully submitted,

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[13] *Harrison* involved abstention under the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496, but its approach is equally sound when the federal court abstains under *Younger*. Both doctrines are designed to further comity with state procedures, rather than to enable the federal court defendant to inflict irreparable injury on the federal court plaintiff. *See Gibson v. Berryhill, supra,* quoted at p. 24, *supra.*